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In the Supreme Court of the United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioners,

vs.

COLLINS G. REED and MRS. COLLINS G. REED,
et al,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief of Petitioner

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REPLY BRIEF OF PETITIONER

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REBUTTAL ARGUMENT

JURISDICTION

The Hon. William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, extended the time for filing the petition for Writ of Certiorari herein to and including November 4, 1966. (Page 22—Appendix to Petition.) The Petition was filed on November 3, 1966. This court has jurisdiction in this matter.

STATUTES INVOLVED—ARGUMENT

Summary judgment was granted in favor of Reed by the District Court under **Rule 56, Fed. Rules of Civil Procedure,** subdivision (e) of which provides in part that a defense must be shown and "summary judgment, if appropriate, shall be entered against him."

Petitioner contends that summary judgment should not have been granted as there was an issue for trial. The District Court held that dismissal of two prior cases against McElroy to cancel a recorded contract describing the lease herein was res judicata. The court's ruling, in effect, attempts to allow a subsequent transfer to prevail in face of the reservation of title in Petitioner herein by a recorded contract. The Respondent claims the recorded agreement of June 17, 1952, was never before the District Court. This is inaccurate and misleading, as the Respondent caused the agreement to be before the court in order to rely upon it to apply the doctrine of res judicata. Respondent stated on Page 18 of his brief in the Circuit Court as follows: "Each complaint attached as an exhibit the purchase agreement of June 17, 1952, * * *." The complaints referred to include cause No. 1557, and it was

held to be res judicata in this case. (Appendix to Petition, pages 19-20.)

In order to be res judicata, there had to be proof that the same claim was made between the same parties or their privies. Since the proof was there of the agreement, the prior complaint, and the order of dismissal, in the same District Court that entered the summary judgment, it is obvious that the recorded agreement and Lis Pendens were before the court, which proved the prior recording of the agreement so that Reed could not be a holder without notice and an issue exists precluding summary judgment.

The trial court found res judicata by dismissal of cause No. 1557. The trial court would have had before it the proof of recording and Lis Pendens. Compare Respondent's present position on page 6 of his Brief in opposition and his position in the Circuit Court Brief, supra. He is taking contradictory positions.

The proof supplied by one party can prove the opposing party's case. The Respondent supplied the issuable fact. This involved application of the Montana recording law, ie. **Section 73-201 R.C.M. 1947.** providing constructive notice to subsequent purchasers, **Section 73-202 R.C.M. 1947,** providing thtt the first instrument prevails, and **Sections 93-3005 and 6205 R.C.M. 1947,** provide for a Lis Pendens in an action affecting title to real property and constituting notice. (Pages 3-4 Petition herein.)

None of the instruments relied upon by Reed were ever recorded in the Clerk and Recorder's office in Fallon County, Montana, where the property is located.

There is no federal recording law as it is governed by

the state recording law. **U. S. vs. Viewcrest Garden Apts., 9th Circuit, 268 F 2d 380.** (Petition, pages 13-14.)

The subsquent judgment in the Industrial Gas Case (Appendix to Petition—pages 23-29) shows that McElroy assigned to Industrial Gas subject to the terms of the agreement of June 17, 1952, (page 25, para. 8 and 9; page 26-27, para. C) and the judgment cancelled the agreements. McElroy assigned, in 1953, to Industrial Gas so that Industrial Gas became the conditional purchaser with Petitioner and rendered cause No. 1557 moot.

The omission by petitioner or its counsel in 1953 to obtain dismissal without prejudice, or to obtain a stipulation to dismiss without prejudice, does not alter the true facts that McElroy tried to assign the property rights to two parties in face of a recorded agreement reserving title in the Petitioner. That recorded agreement was before the trial court.

In the Circuit Court, Respondent attempted to collaterally attack the judgment in favor of Petitioner vs. Industrial Gas, which shows the recorded chain of title. Respondent presented a part of the state court file but omitted some parts. Petitioner supplied the omitted portions and the Circuit Court ordered, in effect, that Respondent could not collaterally attack that judgment.

Section 73-202 R.C.M. 1947 provides that the instrument first recorded prevails over those subsequently recorded. None of Respondent Reed's chain of title is recorded. The agreement of 1952 with McElroy, the agreement of 1953 with Industrial and the judgment cancelling these agreements are all recorded in the manner provided by State and Federal law. At the time of judgment the court had an issue for trial before it.

The Respondent herein attempts to invoke **Humble v. St. John, 72 Mont. 519, 234 Pac. 475,** a part of which case holds that a subsequent deed is an abrogation, or showing of performance, of a prior agreement. The **Humble** case is not applicable and is distinguished on the facts. In **Humble,** there was a claimed error in named grantees. However, in the case before this Court, the contract involves many tracts of land and leases, all subject to a reservation of title in Petitioner herein until the full price was paid by McElroy. McElroy didn't pay but assigned to Industrial Gas and when Industrial did not perofrm, the agreement was terminated. (App. 23-29.)

The motion for new trial and for discovery pending appeal is supported by Affidavits showing that McElroy presented a new and different alleged assignment of the lease in question to corporate officers in California wherein McElroy omitted the clause stating it was subject to the conditional sale agreement. The Respondent has not shown there was corporate authority to sign this second assignment. McElroy pulled a fast one by obtaining the second assignment and by then assigning to his partner who then assigned to a relative. The trial court, by having the complaint in No. 1557 before it knew the conditional contract was not performed because termination was sought, ergo, a showing that consideration had not been paid for the subsequent assignment upon which Reed relies. The motion for new trial shows the issue of consideration, the newly discovered fact of relationship of the parties and invokes the presumption of knowledge between partners. **Sec. 63-204 R.C.M. 1947.**

The law of Montana regarding prior recordings of instruments was not followed. (Pet page 6(1); 28 U.S.C.A.

1652) Case No. 1557 was rendered moot by an agreement which appears in the subsequent recorded judgment; (See State ex rel Haggarty, et al v. Rafn & Blackfeet Tribe, et al, Mont. 304 Pac. 2nd, 918, Vol. 13, No. 9492 of the Montana Advance Sheets (1956); State ex rel Brass v. Horn, 36 Mont. 418, 93 P. 351; and State ex rel Begeman v. Napton, 10 Mont. 369, 25 P. 1045, to the effect that the court is without jurisdiction as there is no controversy.) and the trial court apparently based its decision on the unrecorded assignments from McElroy to Buchtell to Reed thereby disregarding the 9th Circuit case of **U. S. v. Viewcrest Garden Apts., (1959) 268 F 2d 380.** The trial court abused its discretion in not granting discovery pending the motion for new trial or appeal **(Rule 27 F.R.C.P.)** after it was pointed out to the trial court that it had before it the agreement relied upon when it relied upon dismissal of Case No. 1557 as being res judicata. Petitioner contends the trial court did not follow the state law and its decision is in conflict with other cases.

> "In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved." **U. S. v. Hardue Hayaski, 282 F. 2d 599, 601.**

> "Thus, even if we consider defendants' testimony as showing that she received plaintiffs' property from Mae J. Kelly in good faith in consideration * * *, she was not a bona fide purchaser so as to defeat plaintiffs' title." **Kelly v. Grainey, 113 Mont. 520, 129 P. 2d 619, 626.**

Also, see the exert from **Guerin v. Sunburst Oil Co., 68 Mont. 365, 218 P. 949 at 951,** on pages 12-13 of the Petition herein.

". . . The showing of the alleged newly discovered evidence need not present an air-tight case. It suffices if a showing is made of sufficinet new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details. I believe such a showing has been made here, and it can be left to the matter of proof to supply the specific details." **Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713.**

"'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.'"
Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350.

CONCLUSION

This case illustrates how, when other claims were previously involved, a trial court can be lead to overlook an agreement attached to a complaint and to attach significance to an order of dismissal, to overlook the recorded contract and rely on unrecorded instruments, and to overlookthe fact that an assignee (Reed) receives only what the assignor (McElroy) had, ie. an unrecorded instrument subject to the terms and conditions of a recorded contract, thereby not following the established Montana law.

Petitioner respectfully contends that the ends of justice require the granting of the Writ.

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PROOF OF SERVICE

I, DARYL E. ENGEBREGSON, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 13, 1966, I served six copies of the foregoing Reply Brief on Respondent Reed by mailing said copies in a duly addressed envelope, with first class postage prepaid, to his attorney of record: Cale Crowley, attorney at law, 500 Electric Building, P. O. Box 2529, Billings, Montana.

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